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Cases, Notes and Materials on

COMMERCIAL AND CONSUMER TRANSACTIONS

VOLUME II

Seventh Edition

edited by

JACOB S. ZIEGEL

Professor of Law
University of Toronto

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FACULTY OF LAW
UNIVERSITY OF TORONTO

CASES, NOTES, AND MATERIALS ON
COMMERCIAL AND CONSUMER TRANSACTIONS

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SEVENTH EDITION

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VIII. CONTRACTUAL AND OTHER LIMITATIONS
ON THE BUYER'S RIGHTS AND REMEDIES

INTRODUCTORY NOTE

The buyer's position under the SGA is very favourable and if its provisions were mandatory the story would have a simple ending. In fact the real position is much more complex.

(1) In the first place, the SGA provisions are only presumptive and can be freely varied or excluded entirely by agreement between the parties (SGA 53). Needless to say, sellers freely avail themselves of this right and it is a rare agreement which is reduced to writing involving durables which does not contain a disclaimer or restriction of liability clause of some description. For a classification of the clauses, see OLRC Report, p.47. In the retail field such clauses are usually coupled with a manufacturer's express warranty in lieu of the statutory implied warranties and conditions which is less favourable to the buyer. See ch.IX.3.

Inevitably, at first the courts and then the legislatures were drawn into the conflict. Section 1 of this chapter reproduces some of the salient materials. In studying them it is important not to view the contest simply in David v. Goliath terms. The seller and/or manufacturer has quite legitimate reasons for wishing to restrict his liability and, as is so often the case, the search is for a formula that will try and reconcile the conflicting interests of buyer and seller in the great variety of situations likely to arise in practice. Consumer-buyers faced with a printed form contract are not in the same position as Ontario Hydro negotiating for the construction of a multi-million dollar nuclear generating station and a new car dealer seeking to deny liability for a "lemon" deserves less sympathy than a seller (such as in *Kendall v. Lillico* or the *Ashington Piggeries* case) who is faced with a claim for heavy consequential losses because of a latent and not readily discoverable defect not due to the absence of reasonable care on his part. In short, disclaimer clauses are intimately tied in with such basic policy questions as strict liability for defective goods, the measure of damages, and allocation of risk between parties who may or may not be in positions of equal bargaining strength.

(2) Section 2 is concerned with another and no less important form of limitation on the buyer's warranty remedies. In case of durables, the consumer frequently finances the purchaser either by

means of a credit sale or by securing a purchase money loan from a bank or other financing agency. Nowadays tripartite credit cards, e.g., *Chargex*, are also often used for smaller purchases. Suppose the goods are defective, to what extent should the consumer be entitled to refuse payment to the financing agency which has made the purchase money loan or bought the paper from the dealer? As will be seen, the case law and statutory position almost rivals in complexity the position with respect to disclaimer clauses.

(3) The third section raises yet another set of factors which have attracted increasing attention in recent years. How suitable are our existing judicial institutions and rules of court for redressing consumer grievances? Is it realistic to expect a consumer to spend numerous hours and perhaps several hundred dollars to vindicate a claim or defend a suit involving less than a hundred dollars? A variety of solutions have been proposed, both institutional and procedural. At the procedural level consumer class actions have provoked the greatest excitement and debate, and no doubt will continue to do so. What has been your own experience in this area? Are you a militant complainer or do you take your lumps quietly? Do you find the businessmen with whom you deal (in the public as well as in the private sector) more or less responsive than they were a few years ago? In your opinion, is the search for a sympathetic ear the essence of modern consumerism?

